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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO
CENTRAL DIVISION

The People of the State of California,

Plaintiff,

vs.

Marcus Wesson,

Defendant

Case No.: F049017856

Wesson's Notice of Motion

and

Motion to Dismiss

Late yesterday, we, Wesson's team, were advised by the prosecution that it would be filing a first amended complaint.

Because of that change in circumstances, we withdraw Wesson's Motion to Continue, and substitute this Motion to Dismiss.

This motion will be ripe on the 11th court day after Wesson's arraignment, which is April 9, 2004, and Wesson requests that it be set for hearing on that day.

¹ Other members of Wesson's defense team include Ralph Torres and Michael O. Castro.

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1 At this time, Wesson objects to the delay in his preliminary examination because
2 that would accommodate a violation of Mr. Wesson's constitutional and statutory rights.
3

4 The prosecution's proposed amendment is an entirely separate case. We don't
5 doubt that it is an important one, but there was no need for the prosecution to put this
6 case aside to pursue that one. By having done that, the prosecution did not provide
7 Wesson's attorneys the discovery they need to be prepared and effective on this case.
8 Wesson is in jail without bail: he is not a flight risk. It is unlikely that a statute of
9 limitations would have lapsed by waiting a few weeks; indeed, on most felony child
10 molestation cases that would be impossible.

11 The prosecution can file those additional charges separately. The prosecution may
12 claim that case is connected to this one, perhaps involving some of the same witnesses,
13 possibly even some of the same victims. But the legislature has provided for motions to
14 consolidate; the prosecution can pursue that remedy. (Penal Code section 954.) So,
15 again, there was no need to work on that as-yet-unfiled case, and ignore its constitutional
16 and statutory obligations to Wesson in the case already on file, with legal deadlines that
17 must be met.

18 If the prosecution felt compelled to pursue that case so rapidly, the prosecution
19 should have added more members to the prosecution team, so that Wesson's preliminary
20 examination could proceed as required by law.

21 Public Defender did, to meet the legal requirement. At Wesson's arraignment, his
22 team consisted of the two attorneys listed at the top of this motion's first page. To
23 provide Wesson the speedy preliminary examination to which he is entitled, Public
24 Defender quickly doubled the defense team, to also include the two attorneys listed in
25 footnote 1.
26

1 But the prosecution, by working on a separate, as yet unfiled, case, and by not
2 providing Wesson's defense team the discovery to which Wesson is constitutionally
3 entitled, the prosecution has prevented Wesson's defense team from being prepared for
4 the preliminary examination set for today, Wednesday, April 7, 2004.

5 The prosecution cannot lawfully deprive a defendant of the statutory right to a
6 speedy preliminary examination by assigning too few attorneys or by working on some
7 other case.

8 In legal principle, this case is like *People v. Johnson* (1980) 26 Cal.3d 557.
9 Simply substitute "prosecution" for "public defender" or "the judiciary." In *Johnson*,
10 (which occurred in another county), too few public defenders had been hired to handle
11 the caseload. So when the public defender obtained a continuance of Johnson's case
12 beyond its statutory deadline, so as to handle another case that also faced a deadline, the
13 Supreme Court held that Johnson's right to a speedy trial was violated.

14 The court wrote the following at 26 Cal.3d at 571.

15
16 "A defendant's right to a speedy trial may be denied simply by the failure of
17 the state to provide enough courtrooms or judges to enable defendant to
18 come to trial within the statutory period. The right may also be denied by
19 failure to provide enough public defenders or appointed counsel, so that an
20 indigent must choose between the right to a speedy trial and the right to
21 representation by competent counsel."

22
23 This principle applies to the prosecution also. Indeed, *Johnson* itself applied this
24 principle to the prosecution. The court wrote the following, at 26 Cal.3d at 570 (internal
25 quote marks and citation omitted):
26

1 "... [A] criminal defendant may not be deprived of a speedy trial because
2 the prosecution -- or the defense -- is lazy or indifferent, or because the
3 prosecution seeks to harass the defendant rather than bring him fairly to
4 justice...."

5
6 The *Johnson* court ultimately did not actually dismiss that case, because the
7 defendant did not seek appellate relief until after his trial, and then he could not show
8 prejudice. But in our case, pre-trial, Wesson need not show prejudice. See, e.g., *Serrato*
9 *v. Superior Court* (1978) 76 Cal.App.3d 459.

10 We are not accusing the prosecution of being lazy or indifferent, but it is now
11 apparent that the prosecution unnecessarily diverted her attention from the case at hand,
12 with its constitutional imperatives and statutory deadlines, to another, as yet unfiled case,
13 that plainly could have, and should have, waited.

14 If the prosecution had provided us with the constitutionally-required discovery in
15 a timely manner, we could have been prepared for Wesson's preliminary examination
16 today, and it would have proceeded no later than the tenth court day following
17 arraignment (which is Thursday, April 8) as required by Penal Code section 859b.

18 Of the reports that were not provided to us until yesterday, April 6, approximately
19 two-thirds are dated before Wesson was arraigned, and Public Defender was appointed,
20 on March 25, 2004. Those should have been provided on arraignment day.

21 The reports provided us yesterday do not include the search warrants and
22 affidavits. On information and belief there were three of each. On information and
23 belief, at least two of these were served before Wesson's arraignment. Those should
24 have been provided that day.

25 The reports provided us yesterday do not include the results of the gunpowder
26 residue tests. On information and belief, the one on Wesson was done before his very

1 first court appearance, on Wednesday, March 16, 2004. On information and belief, the
2 ones on the deceased were done on or before the day of their funerals, which were before
3 Wesson was arraigned. On information and belief, it does not take three weeks to obtain
4 a result from a gunshot residue test, so surely Wesson's should have been done long
5 before now. Surely, also so should any done on any of the deceased. If the prosecution
6 sent those tests to a lab for results, but the lab could not, or would not, perform the tests
7 in a timely manner, the prosecution had a duty to send them to a different lab.

8 The same analysis applies to fingerprints and ballistics tests, which were also not
9 provided to us yesterday.

10 The reports provided to us yesterday do not include any photographs. The crime
11 scene photographs were all taken within 48 hours of the incident. It does not take three
12 weeks to develop (whether conventionally or digitally) and copy photographs. They
13 should have been provided to the defense at arraignment.

14 In short, almost all of the discovery we needed to prepare could have been, and
15 should have been, provided to us by the day Wesson was arraigned. Anything left could
16 have been and should have been, provided to us shortly afterward.

17
18 If, as we originally thought, the prosecution had been diligently working to meet
19 its constitutional and statutory obligations to Wesson to provide the discovery his
20 attorneys needed to be prepared and provide effective assistance, then good cause would
21 have been presented for a continuance, as provided in Penal Code section 859b, fourth
22 paragraph.

23 In light of the prosecution's not having provided meaningful, timely, discovery,
24 and the intent, instead, to add new, separate, charges, we now see there is no good cause
25 for the delay.

26 Penal Code section 859b, fourth paragraph provides, in relevant part, as follows.

1
2 "Whenever the defendant is in custody, the magistrate shall dismiss the
3 complaint if the preliminary examination is set or continued beyond 10
4 court days from the time of the arraignment ... and the defendant has
5 remained in custody for 10 or more court days solely on that complaint,
6 unless either of the following occur:

7 (a) The defendant personally waives his or her right to preliminary
8 examination within the 10 court days.

9 (b) The prosecution establishes good cause for a continuance beyond the
10 10-court-day period.

11
12 Here, Wesson's preliminary examination cannot proceed within the required 10
13 court days, because his attorneys cannot be prepared.

14 Wesson has never personally waived his right to a timely examination, so
15 exception (a) does not apply.

16 When we filed Wesson's motion for continuance we thought that the prosecution
17 was working diligently on getting us what we needed to be prepared and effective. If the
18 prosecution had been, that would have constituted good cause for delay under exception
19 (b).

20 In light of the totality of circumstances described above, the prosecution cannot
21 establish good cause under exception (b).

22
23 Wesson has remained in custody solely on this Complaint.

24
25 Although ten full court days have not yet elapsed, the prosecution should not be
26 allowed to file an amended, or a new and different, complaint, to defeat a claim that

1 Wesson has been in jail ten court days solely on this complaint. To permit that would be
2 to permit the prosecution to profit from her own failure, without good cause, to meet her
3 constitutional and statutory obligations.
4

5 This case must be dismissed.
6
7
8

9 Respectfully Submitted,
10

11 April 7, 2004
12

13 Date
14

15 Pete Jones by Garrick Byers
16

17 Peter M. Jones
18

19 Garrick Byers
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21 Garrick Byers
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23 Attorneys for Marcus Wesson
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